Supreme Court, U.S.
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No. 96-567

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

COMMONWEALTH OF VIRGINIA,
v. Petitioner,

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,
and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,
Intervenors.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

INTERVENORS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that the judicial review requirement of § 502(b)(6) of the Clean Air Act is constitutional, and whether the court properly deferred to EPA's interpretation of § 502(b)(6) under the principles enunciated by this Court in Chevron, USA v. Natural Resources Defense Council, 467 U.S. 837 (1984).

2. Whether the court of appeals properly found that Congress has the authority, consistent with the Commerce and Spending Clauses, and the Tenth Amendment to the Constitution, to require federal implementation and operation of the title V program of the Clean Air Act in states without an approvable program.

3. Whether the court of appeals properly found that Congress has the authority, consistent with the Commerce and Spending Clauses, and the Tenth Amendment to the Constitution, to condition receipt of federal highway funds in areas that do not meet air quality standards on the state having an approvable program, and to require additional emissions reductions from certain stationary sources of pollution in nonattainment areas.

LIST OF PARTIES BELOW

In accordance with Rule 14(b) of the Rules of the United States Supreme Court, the following is a list of the parties to the proceeding below:

The Petitioner was the Commonwealth of Virginia. The Respondents were the Administrator of the Environmental Protection Agency and the Environmental Protection Agency itself. Intervenors were the American Lung Association of Northern Virginia; the American Lung Association of Virginia; Audubon Naturalist Society; Clean Water Action*; Friends of the Rivers of Virginia; James River Association; Mountain Heritage Alliance; Valley Concerned Citizens; Virginia Chapter of the Sierra Club; Virginia Consortium for Clean Air*; Virginia Council, Trout Unlimited; Environmental Defense Fund*; Kathleen F. Derricott*; Clifton E. Derricott*; Andre L. Brown*; Caleata Johnson*; and Gwen Hedgepath*. Amici Curiae were Virginia Manufacturers Association; Washington Legal Foundation; Ogden Martin Systems of Lancaster, Incorporated; Ogden Martin Systems of Alexandria, Incorporated; National Independent Energy Producers; Ogden Martin Systems of Fairfax, Incorporated; and Chesapeake Bay Foundation.

* These are not parties to this brief in opposition to the Petition for Writ of Certiorari.

In compliance with Rule 29.1, a disclosure of corporate affiliations and Financial Interest was filed with the U.S. Court of Appeals for the Fourth Circuit on February 7, 1995. This document showed that the Intervenor organizations are not publicly owned corporations.

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STATEMENT OF THE CASE

The Clean Air Act Amendments of 1990 ("CAA") establish a national operating permit program for all major facilities that discharge air pollution. CAA § 502, 42 U.S.C. § 7661a (Pet. App. 36-48). Title V's key provision prohibits major stationary sources of air pollution from operating without a valid permit or in violation of a permit. Commonwealth of Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996) (Pet. App. 5).

Congress intended the permitting program to be implemented and administered at the state level, provided the state program meets certain criteria set forth in title V. Among the criteria for approval, each state must provide an opportunity for judicial review in state court of permitting decisions. CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41). Section 502(b)(6) requires that judicial review in state court be available to "any person who participated in the public comment process." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41-42). EPA has determined that the "case or controversy" constraints of Article III of the U.S. Constitution implicitly apply to this requirement. 59 Fed. Reg. 62324, 62325 (1994).

If a state does not submit a program or if a program fails to be approved by EPA, then EPA is required to implement and operate the program in the noncomplying state. CAA § 502(d)(2)(B), 42 U.S.C. § 7661a(d)(2)(B) (Pet. App. 44). In addition, the failure to have an approvable state program triggers certain sanctions. These sanctions include an increase in pollution offset requirements already imposed on private polluters, i.e., a requirement of a 2-1 emissions offset for new or expanded stationary sources of air pollution.

A second sanction is the withholding of certain federal highway funds. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74). Both sanctions are to be imposed only in areas within the state that are not in attainment with air quality standards ("*nonattainment areas*"). *Id.*; *CAA § 173 (c)(1)*, 42 U.S.C. § 7503(c)(1). Even within the nonattainment areas, funds remain available for highway safety projects and other specific transportation projects designed to reduce air pollution from automobiles and trucks. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74).

The Commonwealth of Virginia submitted its proposed title V program to EPA on 12 November 1993. On 17 June 1994, EPA proposed disapproval of the submission, 59 Fed. Reg. 31183 (1994), and on 5 December 1994, EPA published its final disapproval. 59 Fed. Reg. at 62325 (1994). EPA's disapproval was based on the lack of adequate provision under state law for judicial review in violation of § 502(b)(6). Id.

The Commonwealth filed a petition for review on 9 January 1995 in the Court of Appeals for the Fourth Circuit. A unanimous panel of the court of appeals denied the petition, upholding EPA's disapproval of the title V program. Finding EPA's interpretation of the judicial review provision of § 502(b)(6) to be permissible, the court of appeals also held that the federal implementation provision and the title V sanctions were valid exercises of Congress' Spending and Commerce Clauses and consistent with the Tenth Amendment to the Constitution. The court of appeals denied a petition for a rehearing with a suggestion for rehearing en banc on 12 July 1996.

SUMMARY OF ARGUMENT

The court of appeals held that the Environmental Protection Agency acted lawfully when it disapproved Virginia's title V program on the grounds that it did not contain an adequate judicial review provision. The court of appeals properly found that § 502(b)(6) is constitutional, and, in accordance with the principles outlined in this Court's decision in Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), deferred to EPA's construction of the provision.

The court of appeals also properly held that the sanctions and federal implementation provision are valid exercises of congressional authority under the Spending and Commerce Clauses. As the court stated, "[b]ecause the elimination of air pollution promotes the general welfare, Congress may tie the award of federal funds to the states' efforts to eliminate air pollution . . . . Furthermore, the Commerce Clause . . . gives Congress the power to regulate 'activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.'" Browner, 80 F.3d at 881 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981)) (Pet. App. 26).

Relying on this Court's decisions in New York v. United States, 505 U.S. 144 (1992) and Hodel, the Court also properly rejected Petitioner's Tenth Amendment attack on the statute. The Court found that the sanctions and federal implementation provisions were permissible inducements to the states to persuade them to comply with the requirements of title V. Further, the Court appropriately held, in accordance with this Court's decision in South Dakota v.

Dole, 483 U.S. 203 (1987), that the conditions on federal expenditure of funds were reasonably related to the purposes of the Clean Air Act. Because the court of appeals was correct in its analysis and holding, and because its decision is consistent with this Court's decisions, this Court should deny the petition for writ of certiorari.

ARGUMENT

I. FINDING THAT § 502(b)(6) OF THE CLEAN AIR ACT IS CONSTITUTIONAL, THE COURT OF APPEALS PROPERLY DEFERRED TO EPA'S INTERPRETATION OF THAT PROVISION.

Section 502(b)(6) of the Clean Air Act (CAA) provides for judicial review in State court of a final permit action. This provision unambiguously directs that "an opportunity for judicial review in State court of the final permit action" must be provided to "the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41).

Section 502 further requires the Administrator of the Environmental Protection Agency (EPA) to promulgate regulations establishing the minimum elements necessary for an approvable state permit program under title V. CAA § 502(b)(1)-(10), 42 U.S.C. § 7661a(b)(1)-(10) (Pet. App. 37-43). The statute directs that these elements shall include, among other items, the provision for judicial review set forth in § 502(b)(6), and the regulations promulgated by EPA

mirror the statutory requirements. 40 C.F.R. § 70.4(b)(3)(x)(1994).

As the court of appeals stated, a literal reading of § 502(b)(6) would require that a state allow any person who participated in the public comment process to seek judicial review of permitting decisions. Browner, 80 F.3d at 877 (Pet. App. 16). EPA, however, does not require that states go that far. Instead, it has determined that the "case or controversy" constraints of Article III of the U.S. Constitution implicitly apply to the statutory and regulatory requirement that judicial review be available to "any person who participated in the public comment process." See 59 Fed. Reg. at 62325. Thus, § 502(b)(6) is satisfied if a state simply grants standing to those participants in the public comment process who would also have Article III standing to sue in federal court.

EPA disapproved the Commonwealth's title V permit program because Virginia's plan contained inadequate judicial review provisions in violation of § 502(b)(6), id. at 62324, and the court of appeals upheld EPA's action. That Virginia's law of standing fails to meet the judicial review provisions of § 502(b)(6) is not an issue in this petition.[1]

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[1] The court of appeals found that "Virginia case law makes it clear that ... [its] 'pecuniary and substantial' interest requirement is more stringent than Article III's requirement of concrete and particularized injury." Browner, 80 F 3d at 879 (Pet. App. 21-22). It based its decision on review of state law cases: Environmental Defense Fund v. Virginia State Water Control Board, 404 S.E.2d 728, 731-32 (Va. App. 1991) (standing to appeal water pollution permit denied to association of recreational users and riparian landowners); Town of Fries v. State Water Control Board, 409 S.E.2d 634, 637 (Va. App. 1991) (town lacked standing to review water pollution permit even though discharge was

Virginia's standing law under the State Air Pollution Control Act (Pet. App. 77) is flatly inconsistent with Article III requirements, much less any potentially broader requirement that standing be allowed to anyone who participated in the public comment process. [2] Rather, the issues are whether § 502(b)(6) is constitutional and whether the court of appeals properly deferred to EPA's interpretation that § 502(b)(6) is constrained by Article III.

The court found that § 502(b)(6) is constitutional on the grounds that it does not compel the states to modify their standing rules; it merely induces them to do so. Browner, 80 F.3d at 880-81 (Pet. App. 24-25). A state has the option to allow the federal government to regulate air pollution sources if it chooses not to meet the requirements of § 502(b)(6). Moreover, the court also noted that, under the Supremacy Clause, state courts may be required to apply federal law, when applicable, and to adjudicate disputes arising under federal law. Id. at 880 (Pet. App. 24).

The Commonwealth's claim that this court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), dictates a contrary result is mistaken, as the court of appeals found. In Ashcroft, the question was whether the federal Age

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directly upstream); and Citizens for Clean Air v. Commonwealth, 412 S.E.2d 715, 719-21 (Va. App. 1991) (association not aggrieved under state air law even though association members owned real estate near plant).

[2] As the court of appeals found, the provision in § 502(b)(6) that judicial review be afforded to "any other person who could obtain judicial review of that action under applicable law" preserves any state standing rule that potentially would be broader than Article III requirements. Browner, 80 F.3d at 877 (Pet. App. 16).

Discrimination in Employment Act ("ADEA"), which covered state "employees," included state judges. Id. at 464-70. Because the ADEA contained no reference to state courts or judges, this Court declined to interpret the ADEA to apply to the state judiciary. The Court's decision was based on the principle that federal courts must not imply congressional intent to alter the usual balance between federal and state powers unless congressional intent to do so is clear from the language of the statute. Id. at 470.

Unlike the situation in Ashcroft, there is no ambiguity here regarding the applicability of § 502(b)(6) to the states. As the court of appeals stated, § 502(b)(6), "[b]y its terms, could apply to *nothing but state courts*." Browner, 80 F.3d at 879 (emphasis in original) (Pet. App. 20). EPA has simply construed the reach of the standard set forth in § 502(b)(6).

Faced with EPA's interpretation that Article III case or controversy requirements implicitly constrain § 502(b)(6), the court of appeals followed this Court's decision in Chevron and deferred to the agency's interpretation. As the court stated, EPA's interpretation, if reasonable, must be upheld and take precedence over any other interpretation the parties or the court could formulate. Browner, 80 F.3d at 878 (Pet. App. 17-18).

EPA's rationale for concluding that § 502(b)(6) is tempered by Article III is that if EPA were to disapprove a state program, and thus had to implement a title V program, citizens would have access to judicial review only if they met the minimal standing requirements of Article III of the U.S. Constitution. See 59 Fed. Reg. at 62325. The court of appeals found "EPA's importation of Article III principles to resolve the slight tension within CAA § 502(b)(6) to be

reasonable." Browner, 80 F.3d at 878 (Pet. App. 18). In addition, as the court of appeals noted, the legislative history shows that Congress intended that "interested persons who arguably are affected by permit decisions are guaranteed their day in court." Browner, 80 F.3d at 877 (quoting Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990) (citations omitted) (Pet. App. 15). Thus, contrary to Petitioner's claim, the legislative history supports EPA's interpretation.

In sum, neither Petitioner's claim that EPA exceeded its discretion to interpret the standing provision as constrained by Article III nor its claim that the state is coerced into changing its standing law provides a valid reason for this Court's discretionary review.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT FEDERAL IMPLEMENTATION OF THE TITLE V PERMIT PROGRAM AND THE SANCTIONS PROVISIONS ARE VALID EXERCISES OF CONGRESSIONAL AUTHORITY.

A state's failure to submit a title V permit program or the submission of a program that fails to meet the statutory and regulatory criteria means that EPA must develop and implement its own title V permitting plan within the noncomplying state. CAA § 502(d), 42 U.S.C. 7661a(d) (Pet. App. 43-45). As the court of appeals stated, the federal government then becomes wholly responsible for the program; the state is not required to do anything to assist EPA in this effort. Browner, 80 F.3d at 873-74 (Pet. App.

6-9).[3] EPA's disapproval of a state's title V permit program also triggers certain sanctions, which include the withholding of certain federal highway funds and an increase in the pollution offset requirements already imposed on private polluters. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74-76).

Relying on this Court's decisions in New York v. United States, 505 U.S. 144 (1992); Hodel v. Virginia Surface Mining & Reclamation Ass'n 452 U.S. 264 (1981); and South Dakota v. Dole, 483 U.S. 203 (1987), the court rejected petitioner's Tenth Amendment attack on the federal implementation and sanctions provisions of the Clean Air Act. Instead, it found that such provisions were permissible inducements to the states to persuade them to comply with the requirements of title V. Thus, the court held that all of the provisions at issue comport with the requirements of the Tenth Amendment. Because the court of appeals was correct in its analysis and holding, this Court should deny the petition for certiorari.

A. The Implementation and Sanctions Provisions Comport with the Tenth

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[3] Although the court of appeals refers to federal permit implementation as a "sanction," the sanctions provision of the statute in fact includes only highway sanctions and offsets. CAA § 179(b)(1), (2), 42 U.S.C. § 7509(b)(1), (2) (Pet. App. 74-76). Instead, federal implementation is addressed in the provisions relating to submission and approval of a title V program. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3) (Pet. App. 45). If no state program has been approved two years after the required date of submission, then the EPA Administrator is required to "promulgate, administer, and enforce a [title V] program" for that state. Id.

Amendment and this Court's Analysis in *New York* and *Hodel*.

As the court below stated, the essence of a Tenth Amendment violation is that the state is commanded to regulate. Regarding the federal implementation provision, the court found no violation because "Virginia is not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia." Browner, 80 F.3d at 882 (Pet. App. 29).[4] The court concluded that the federal implementation provision is constitutional because "'the full regulatory burden will be borne by the Federal government'". Id. (Pet. App. 29). (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 288).

In reaching this conclusion, the court stated that this Court's decision in Hodel was controlling and was in fact "the mirror image of this case." As the Court explained:

> In Hodel the federal government first implemented an environmental regulatory regime within each state but then gave each

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[4] Petitioner wrongly states that the court of appeals "evaded the Tenth Amendment issue in this case by ignoring mandatory language of Title V." Pet. Brief at 16. In fact, the court expressly addressed and rejected this contention. Browner, 80 F.3d at 883 (Pet. App. 30). Similarly, Justice O'Connor rejected a similar argument in New York, stating that courts should interpret statutes to avoid constitutional problems unless such interpretation would clearly be contrary to congressional intent. New York, 505 U.S. at 170.

> state the ability to end the federal program by implementing its own state environmental regulations that met certain criteria. In the present situation, the federal government gives the states the chance to enact their own regulations before the federal plan is imposed. For purposes of constitutional analysis, we cannot see how it makes a difference whether the federal plan is imposed first, or whether the states are given the chance to avoid imposition of the federal plan first. If anything, the CAA's method -- to give the states a chance first to avoid imposition of any federal plan ... -- seems less coercive than the program upheld in Hodel.

Browner, 80 F.3d at 882-83 (Pet. App. 29-30).

This Court's decision in New York v. United States, 505 U.S. 144 (1992), also fully supports the court of appeals' ruling that the federal implementation requirement is constitutional. In New York, this Court held that the Low Level Radioactive Waste Policy Amendments Act, as a whole, did not coerce state compliance because Congress offered the states a choice to regulate according to federal standards or have the state rules preempted by federal regulation. Id. at 167. Writing for the Court, Justice O'Connor stated that such programs give the states a choice: "they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program ...." Id. at 168.

In New York, the Court found the Act's monetary and access incentives were constitutional exercises of Congress' authority under the Commerce and Spending Clauses of the

U.S. Constitution. The third provision, however, commanded the states either to regulate according to federal statute or to take title to radioactive waste generated within its borders. Id. at 175. The Court found this provision unconstitutional because Congress may neither command the states to regulate nor compel transfer of ownership of radioactive waste from waste generators to recalcitrant states. Unlike the regulatory framework at issue here, Congress provided no option for the state to decline the federal program, thus impermissibly crossing the line from encouragement to coercion. Id. at 175-77.

By contrast, Congress in the Clean Air Act has given the states the option to decline the federal program or avoid preemption and implement their own plans that meet federal standards. Browner, 80 F.3d at 883 (Pet. App. 30). The state thus may "do nothing," leaving the federal government to implement the federal program.[5] Id. at 882 (Pet. App. 29). Under the analyses in both New York and Hodel, the court of appeals thus properly found that the CAA does not

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[5] Printz v. United States and Mack v. United States, Nos. 95-1478 and 95-1503, involving provisions of the Brady Bill, and currently under review by this Court, are distinguishable from Browner. Under the Brady Bill, Congress has directly ordered the state chief law enforcement officers to conduct background checks of persons seeking to purchase handguns until 1998 when a national background check system will be in place. Petitioner's Brief on Writ of Certiorari. Printz v. United States, Nos. 95-1478 (LEXIS, Genfed library, Briefs file). By contrast, Browner involves a program of cooperative federalism; states are not coerced but rather encouraged through a series of incentives to administer an air pollution permit program. The critical distinction between the Brady Bill provision and the CAA is that, under the CAA, states may opt not to regulate.

cross the line from inducement to coercion. Browner, 80 F.3d at 882 (Pet. App. 28-30).

The court of appeals also correctly determined that the sanctions provisions, which trigger withholding of federal highway funding, discussed in Section II.B. infra, and which impose a 2-1 emissions offset, are within congressional authority and do not violate the Tenth Amendment. Congress may develop incentives to encourage state implementation so long as each is a proper exercise of congressional authority. See New York, 505 U.S. at 166-68.

In this case, the court of appeals found that the requirement of a 2-1 emissions offset for new or expanded sources of stationary pollution in nonattainment areas did not pose a Tenth Amendment concern because it applies to private pollution sources, not states. Browner, 80 F.3d at 882 (Pet. App. 28). This sanction thus does not burden the state as a governmental unit but falls on private parties. As Justice O'Connor wrote in an analogous situation, such action "does not violate the Tenth Amendment, for it merely pre-empts state control of private conduct, rather than regulating the 'States as States'." FERC v. Mississippi, 456 U.S. 742, 775 n.1 (1981) (Justice O'Connor concurring in part, dissenting in part).

There is also no basis for the Commonwealth's contention that the court of appeals' analysis is faulty for allegedly failing to assess the cumulative effects of the sanctions. To the contrary, the court of appeals properly followed this Court's decision in New York, which requires an analysis of each individual incentive to determine whether it is a proper exercise of congressional authority under the Constitution.

In addition, petitioner's assertion that the sanctions are coercive because they will continue after a federally implemented program is in place is also without merit. Congress clearly has the authority under its Commerce and Spending Clauses, as the court of appeals found, directly to impose restrictions designed to reduce overall pollution, such as the 2-1 emissions offset and the withholding of federal funds for transportation projects that increase use of the automobile. Browner, 80 F.3d at 882 (Pet. App. 28). Accordingly, it is well within Congress' authority to impose these restrictions as sanctions if the federal government must bear the full responsibility for implementation in the event that the state chooses not to administer the title V program.[6]

B. The Court of Appeals Properly Relied on this Court's Ruling in *South Dakota v. Dole* in Holding that Congress Could Condition Receipt of Federal Highway Funds on Compliance with the Requirements of Title V.

The court of appeals also properly held that the highway sanction is a valid exercise of congressional authority under the Spending and Commerce Clauses.

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[6] Moreover, Petitioner erroneously states that EPA has the option under section 113 of the CAA to take administrative, civil and criminal action against a noncomplying State. Pet. Brief at 20. As the court of appeals noted, section 113 deals not with disapproval of a permit program but with "State Failure to enforce SIP or permit program." It explicitly applies only after a program has been approved, and then only to "violations of . . . an approved permit program." Browner, 80 F.3d at 881 n.6 (Pet. App. 25) (citing CAA § 113, 42 U.S.C. § 7413) (Pet. App. 68).

Browner, 80 F.3d at 881 (Pet. App. 26-27). As the court of appeals stated, "[b]ecause the elimination of air pollution promotes the general welfare, Congress may tie the award of federal funds to the states' efforts to eliminate air pollution . . . . Furthermore, the Commerce Clause . . . gives Congress the power to regulate 'activities causing air or water pollution, or other environmental hazards that may have effects in more than one state.'" Id. (quoting Hodel, 452 U.S. 264, 282 (1981)).

Having determined that the withholding of federal funds was validly based on the Spending and Commerce Clauses, the court of appeals analyzed the sanction under this Court's decision in South Dakota v. Dole, 483 U.S. 203, 211 (1987), to determine whether Congress overstepped its bounds under the Tenth Amendment. The court's analysis involved two inquiries. First, whether "the financial inducement offered by Congress [is] so coercive as to pass the point at which 'pressure turns into compulsion.'" Browner, 80 F.3d at 881 (quoting South Dakota, 483 U.S. at 211) (Pet. App. 26). Second, whether the conditions to which the federal funds are subject are "'reasonably related to the purpose for which the funds are expended.'" Id. (quoting South Dakota, 483 U.S. at 213).

First, the court of appeals properly held that the highway sanction "does not rise to the level of 'outright coercion.'" Browner, 80 F.3d at 882 (Pet. App. 27). As the court explained, a state does not lose any highway funds that would be spent in areas of the state that are in attainment. Browner, 80 F.3d at 881 (Pet. App. 27). The withholding of federal funds only applies to projects that would increase pollution in areas of the state that do not meet air quality standards. And, even within these nonattainment areas, eight

exemptions allow federal funding for a variety of projects designed to promote safety or reduce air pollution. Id. These exemptions include: (1) public transit capital programs; (2) construction of highways or lanes for buses or other high occupancy vehicles; (3) employee work-trip-related reductions; (4) projects to improve traffic flow and reduce emissions; (5) fringe and corridor parking projects; (6) vehicle control programs for downtown or congested areas; (7) vehicle management and information systems to reduce congestion and emissions; and (8) any other transportation related programs that would improve air quality and not encourage single occupancy vehicle use. CAA § 179(b)(1)(A)&(B), 42 U.S.C. § 7509 (b)(1)(A)&(B) (Pet. App. 74-75).

Moreover, the court noted that the highway sanction is less severe than other sanctions upheld in other cases. Id. at 881-82 (Pet. App. 27). For example, under the statute in New York, a claim to all federal grants was forfeited if certain milestones were missed. See New York, 505 U.S. at 173. Similarly, in Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), all federal highway funding was withheld unless the state posted a maximum speed limit of 55 miles per hour on all roads, including those that were not part of the federal interstate network.

Second, the court of appeals found that the highway funding conditions are "reasonably related" to the goal of reducing air pollution. Browner, 80 F.3d at 882 (Pet. App. 28). As the court stated:

> The CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may

> ensure that funds it allocates are not used to exacerbate the overall problem of air pollution. It is therefore of no consequence that a highway sanction, which will have the effect of reducing emissions from mobile pollution sources, is being used to induce compliance with a portion of the Act designed to reduce emissions from stationary sources.

Id. (Pet. App. 28).

The court's analysis is correct. The legislative history of the Clean Air Act is replete with references to the impact of vehicle emissions on air quality. See, e.g., H. Rep. No. 101-490, 101st Cong., 2d Sess. 4 (1990). In furtherance of the Clean Air Act's goals and in order to persuade states to implement the statute, Congress conditioned receipt of federal transportation funds in nonattainment areas on an approvable state title V program for stationary sources and an adequate state implementation plan (SIP) for mobile (vehicle) emissions. The EPA Administrator is instructed to apply the sanctions provisions both to nonapproved title V programs and to inadequate SIPs. The highway funding sanctions will further reduce pollution from vehicles in the most polluted areas of the state. Thus, the conditions clearly "bear some relationship to the purpose of the federal spending." New York, 505 U.S. 144 at 167.

CONCLUSION

Rule 10(c) of the Rules of this Court provides that a writ of certiorari will be granted only for compelling reasons. Because there are no such compelling reasons in this case, this Court should refuse to exercise its discretion to hear this case. In particular, the court of appeals properly applied the

principles that this Court enunciated in Chevron in deferring to EPA's interpretation of the Clean Air Act to limit standing according to Article III of the U.S. Constitution. The court of appeals also properly found title V to be a valid exercise of congressional authority under the Commerce and Spending Clauses and consistent with the Tenth Amendment principles. Because the court's decision is also fully consistent with the precedent of this Court, including New York v. United States, Hodel v. Virginia Surface Mining & Reclamation Ass'n., and South Dakota v. Dole, and is in conflict with no other reported federal circuit case, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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